United States Court of Appeals

for the Second Circuit

PETITIONER’S BRIEF

NO. 76-4234

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JO JO MANAGEMENT CORP.
d/b/a/ GLORIA'S MANOR HOME FOR ADULTS,

Respondent.

B/P/1

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities on behalf of a rival union at a time when the Company was recognizing an incumbent Union, giving the impression of surveillance of such activities, and threatening reprisals if they continued those activities or voted against the incumbent Union in a deauthorization election.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3), (4), and (1) of the Act by discharging and refusing to reinstate employee Donald O'Toole because of his rival union activities and his participation in filing a deauthorization petition with the Board.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(2) and (1) of the Act by withholding union dues from the pay of employees who had not signed checkoff authorizations, by soliciting employees' signatures on dual purpose membership/checkoff cards, and by threatening employees with discharge for refusing to sign checkoff authorizations and pay dues and initiation fees which were not uniformly required of other employees.

4. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by acceding to the Union's concededly unlawful request that it discharge five employees for failure to sign checkoff authorizations and pay dues and initiation fees which were not uniformly required of other employees.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), for enforcement of that portion of its order (A. 33-35, 49)[1/] issued against Jo-Jo Management Corp. d/b/a Gloria's Manor Home for Adults (hereinafter "the Company" or "the Home") on September 1, 1976.[2/] The Board's decision and order are reported at 225 NLRB No. 156. This Court has jurisdiction, the unfair labor practices having occurred at Rockaway Beach, New York, where the Company is engaged in the operation of a nursing home and home for the aged with related facilities (A. 3).

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company received its license to operate the Home and accepted its first residents in May 1974 (A. 558). Prior to that time, it hired a number of employees and, on May 1, 1974, it entered into a three-year collective bargaining agreement with the Medical and Health Employees

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1/ "A." references are to the printed appendix. "S.A" references are to the supplemental appendix contained in the Board's brief. References preceding a semicolon are to the Board's findings. Those following are to the supporting evidence.

2/ The Board also filed an application for enforcement of that portion of its order issued against the Medical and Health Employees Union, Local 4, Office and Professional Employees International Union, AFL-CIO. The Union, however, did not file an answer to the Board's application for enforcement. On January 4, 1976, the Board filed a motion for default judgment against the Union which this Court granted on January 27, 1977.

Union, Local 4, Office and Professional Employees International Union, AFL-CIO (hereafter "the Union"). This contract required union membership as a condition of employment and provided for checkoff of union dues. (A. 5; 128,558, S.A. 1-3). Exh. 1.) Shortly, thereafter, employee Donald O'Toole was called to the office of Company Administrator Joseph Hagler and, in his presence, was appointed shop steward by the Union's then president, Bob Gordon (A. 5; 147-148, 199). Gordon had previously advised O'Toole that the Union would be representing the Company's employees and had enlisted his aid in soliciting dual purpose membership/checkoff authorizations (A. 5; 142-143, 145-146).

Some time later, O'Toole asked Gordon for a copy of the bargaining agreement, but Gordon told him that there was no agreement (A. 5; 150,156, 204). After receiving complaints from employees that the Union was doing nothing for them, O'Toole renewed his inquiry in late June, and, when Gordon again denied the existence of an agreement,

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3/ The single card, entitled "Application and Checkoff Authorization Blank," reads as follows (A. 13, n. 11; 114-119):

> I, the undersigned, hereby apply for membership in the above Local Union and I authorize it to represent me for the purpose of collective bargaining, and I authorize and irrevocably direct my Employer to deduct from my wages initiation fees, monthly dues, and assessments, to become due to it as the periodic dues, initiation fees and assessments uniformly required by said Local Union as a condition of acquiring or maintaining membership, and in compliance with the Labor-Management Relations Act of 1947 . . . .

O'Toole asked him to come and talk to the employees (A. 5; 155-156, 204). Gordon met with the employees early in July, acknowledged that an agreement had been signed, and promised, inter alia, that initiation fees would be waived for all employees hired prior to May 1 and that employees hired thereafter would not have to pay initiation fees until after the contract's first anniversary date (A. 5 and n. 1, 16, n. 14; 150, 156, 238-239, 472, 477).

In mid-July, O'Toole telephoned Bill Morales, business agent of Local 1115, Joint Board Nursing Home and Hospital Employees Division (hereafter "Local 1115") and inquired about contractual benefits obtained by that union (A. 5; 156-157, 159-160, 203). Morales met with the employees a few days later, and O'Toole subsequently solicited authorization cards for Local 1115 (A. 5; 160, 162-163, 184, 210, 215-216). On July 30, Local 1115 filed a representation petition with the Board (A. 6; 131, 565). The petition was subsequently withdrawn.

B. The Company interrogates employee Donald O'Toole about rival union activity, gives the impression of surveillance, and threatens reprisals

In late July, prior to the filing of the representation petition, Administrator Hagler learned that the employees were signing authorization cards for Local 1115 (A. 6; 609). He called O'Toole into his office, showed him a list of employees who had attended the meeting with Morales, and demanded to know why they were dissatisfied with the incumbent Union, why they were signing cards for Local 1115, and what had happened at the meeting (A. 5; 166-167, 208-210). O'Toole explained

that he had gone over to Local 1115 "for the benefit of the people," whereupon Hagler accused O'Toole of "turning against him" and "causing nothing but problems" (A. 5; 166-167). Hagler said that "he had given five dollars to someone who was at the meeting, and that they had given him the names of everybody who was at the meeting and that's how he found out who was there" (A. 5; 166-167, 209).

On another occasion, Hagler arrived at the Home after 8:30 a.m., noticed that breakfast had not yet been served, and went to the kitchen to investigate (A. 6; 626-627). Finding a group of employees discussing Local 1115, he singled out O'Toole, who had worked the night shift and had already punched out, and stated that O'Toole would be better off if he would concentrate more on his work than on holding up operations (A. 6; 626-627. Subsequently, Hagler told O'Toole that he knew a lot of people and could see to it that O'Toole was fired "because of [his] activities for Local 1115" (A. 5; 170).

On August 19 and again on September 6 and 7, the employees signed petitions to rescind the union security provisons of the collective bargaining agreement (A. 7; 53-54, 171, 178). On September 10, Local 1115 filed with the Board a union deauthorization petition, which was signed by O'Toole and two other employees (A. 7; 171; 103, 567-568). A copy of the petition was received by the Company on Thursday, September 12 (A. 7; 103, 56).

C. The Company discharges and refuses to reinstate employee O'Toole and warns employee William Cleary that if he liked his job he would know how to vote in a Board election

O'Toole was employed as a diswasher in April but was transferred or promoted to night switchboard operator and security man sometime in July (A. 7; 133). In the latter assignment, he worked from 10 p.m. until 6 a.m. or 8 a.m., 4 days a week (A. 7; 135, 261-263, 655-666). His security duties required him to lock the gates at both ends of the building grounds which covered a city block, lock the doors to the building, and make the rounds of the building every two hours throughout the night, in the course of which he traversed the corridors and stairwells of a four story building one block long, and punched eight separately located stations for the "detex clock system" (A. 7; 138-139, 646-655). Each round took "anywhere between five and maybe ten minutes" (A. 7; Tr. 139). As switchboard operator, he was to respond to any calls or signals from residents and investigate what their needs were, including going to their rooms (A. 7; 138-139). In addition, he was occasionally required to perform porter work, including vacuuming the lobby rug and sweeping and mopping the dining room floor (A. 7; 137). During periods when he was absent from the switchboard, a microphone system was placed in operation which would relay the switchboard signals to wherever he might be (A. 7; 187).

At some time prior to September, Hagler told O'Toole to bring in the lawn chairs at night and place them in a designated place (A. 9

n. 6; 192-194). O'Toole pointed out to Hagler that if he placed the chairs in that place, it would block the fire exit and constitute a danger to the residents. O'Toole told Hagler that he "would leave the chairs right outside where [he sat] at the switchboard and [he could] observe the chairs from inside the building." (A. 9 n. 6; 194). Hagler did not "voice . . . any opposite opinion," and O'Toole did not bring the chairs in thereafter (A. 9 n. 6; 102).

On Monday, September 15, at about 1:30 a.m., O'Toole went to the kitchen to get some food from the refrigerator to take back to the switchboard (A. 8; 185, 206-207). Hagler entered the kitchen and began shouting that O'Toole had left the switchboard unmanned, that he had not brought in the lawn chairs, and that he was fired (A. 8; 185, 192, 217, 219, 224, 229-230). He led O'Toole to his office, showed him some documents relating to the deauthorization petition, and stated that O'Toole's activities in support of Local 1115 were not doing O'Toole any good and were costing Hagler "a bundle in legal fees" (A. 8; 188-192, 219-220). Hagler further stated that he felt O'Toole had turned against him and that "he was just going to throw [O'Toole] out on the street and see what Local 1115 or anybody else would do to help [him]" (A. 8; 191-192). He then asked O'Toole to write out a statement admitting that he had been negligent in the performance of his job (A. 8; 192). O'Toole refused and Hagler said that he would consult his attorney to ascertain whether it would be in his best interest to hire O'Toole back (A. 9; 195, 217-218). He instructed O'Toole to report back on Thursday for an answer (A. 9; 195).

When O'Toole returned on Thursday, Hagler said that he had been unable to reach his attorney and had decided to let the discharge stand (A. 9; 196). He added that "nothing personal" was involved, but that O'Toole's involvement with Local 1115 rendered him of no further use to the Company (A. 9; 196).

An election on the deauthorization petition was held on October 11 (A. 14). Two hours before the election, Hagler told employee William Cleary that if he "liked [his] job [,he would] know how to vote" (A. 14; 418(j), 448). The election results were inconclusive, and the petition was subsequently withdrawn (A. 19 n. 17; 706).

D. The Company withholds union dues from the wages of employees who did not sign checkoff authorizations and solicits employees to sign dual purpose membership/checkoff cards

On September 4, 1974, and once a month thereafter, the Company deducted $6 for Union dues from the paycheck of each employee hired prior to August 1, 1974 (A. 13, 28, n. 40; 75-105). On October 9, dues were deducted from the wages of employees Mary Abernathy, Bill Cleary, Maria La Paz[4/] and Wanda Sullivan, who were hired in August 1974; on November 6, dues were deducted from the wages of employees

4/ No charge was filed with respect to elployee La Paz.

Kathryn Curry and Joan Gruenke, who began work in September 1974 (A. 14; 78-81, 263, 267, 312, 405-406, 420, 455, 502, 532-533). None of these employees had signed the Union's dual purpose membership/checkoff authorization cards or otherwise authorized checkoff of dues (A. 13; 469, 371, 421-422, 514). About six months later, on June 19, 1975, the Company commenced deducting initiation fees in the amount of $1 or or $2 a month from the wages of employees hired after the execution of the collective bargaining agreement (A. 29, n. 488, 498).

When they received their October 9th paychecks, employees Abernathy and Sullivan informed the Company's bookkeeper, Barbara Pearlstein, that they had not signed checkoff authorizations and asked why the $6 deductions had been made (A. 14-15; 269, 533). Pearlstein responded, "It's union dues . . . everybody has it taken out" (A. 14; 269-270).

In November, employees Cleary, Curry and Gruenke also protested to Pearlstein that unauthorized deductions had been made for Union dues (A. 14; 315, 373, 410-412, 422). Pearlstein told Cleary that those were Hagler's instructions and referred Curry to the new shop steward, Evelyn O'Connor. Curry contacted O'Connor who told him: "[Y]ou're automatically in the union after you are here four weeks and Mr. Hagler deducts $6 from your pay for the union" (A. 14; 315-316, 373-374, 411). In December, employee Gruenke took the matter up with Hagler, who merely advised her that the money was for the Union (A. 14; 503, 517).

Meanwhile, on November 3, Local 1115 filed a second representation petition with the Board (A. 18, 20; 110-113). Two weeks later, Victor Gulino, the new Union president, met with the employees and asked them to sign a petition stating that they would have nothing further to do with Local 1115 (A. 16; 271-273, 283-284, 317-320, 412-414, 499-500). Employee Curry responded by asking Gulino why $6 had been deducted from her paycheck for Union dues when she had not received or signed a membership card, had not previously seen a Union representative, and had not authorized checkoff of dues (A. 16; 318-319). Gulino replied, "[A]fter you're working four weeks you are automatically in the union regardless if you sign a statement or not" (A. 16; 318-319). Employee Abernathy interjected that dues were also deducted from her paycheck without authorization, and Gulino told her to "forget about . . . that particular matter at the moment" (A. 16; 274-275, 318-319). Curry then asked how much the initiation fee would be (A. 16; 319). Gulino said that the initiation fee was $35 but that present employees would not have to pay it and that it would only be required of employees hired in the future (A. 16; 278, 316, 413).

The employees also questioned Gulino about employee benefits, asserted that they were insufficient, and stated that they wanted a better contract (A. 16; 274, 320, 413). Gulino replied that he was there to represent them, but as long as they were meeting with Local 1115, he was in no position to bargain for them (A. 16; 275-276, 500). The

employees agreed to sign Gulino's petition, if he would bargain for them "in good faith" (A. 17; 276-277). Employee Curry, who was was elected shop steward at this meeting, stated that she would circulate the petition provided that it was written on a Union letterhead (A. 16; 276-277, 320-321, 414). She also asked for a copy of the collective bargaining agreement, and Gulino said that he would get her one (A. 16-17; 320).

In early January 1975, after Curry had circulated the petition, she and Gulino met with Administrator Hagler, outlined the employees' demands and inquired about changing or modifying the bargaining agreement (A. 18; 55, 337-338, 383-384, 688-689, 716). Hagler promised to call his attorney and let them know within five days "whether they would have a new contract for the employees" or add to the existing agreement (A. 19; 337, 384, 688-689). Curry heard nothing further from Hagler or Gulino (A. 19; 385). On January 24, the Board's Regional Director dismissed Local 1115's representation petition (A. 19, n. 17; 111). On January 25, Curry arranged another meeting with Local 1115, and the employees again signed membership cards for that union (A. 19; 343-346).

Shortly thereafter, Gulino checked with bookkeeper Pearlstein, verified that Perlstein had checked off dues for a number of employees who had not signed the Union's dual purpose cards, and advised her that checkoff of dues was unlawful without signed authorizations (A. 20,

n. 18, 20; 715). Gulino then asked the employees to sign the dual purpose cards but met with mixed results (A. 720-721). When employees Abernathy and Sullivan signed for their first pay checks in February, Pearlstein handed them dual purpose cards and told them to sign the cards and return them as soon as possible (A. 19; 309, 549). The employees refused (A. 19; 309-310, 549).

About February 24, Gulino approached employee Curry, and, in the presence of other employees, asked her to sign a paper he had with him authorizing the Union to accept the previously deducted dues (A. 20; 347-348, 720). Curry brushed the paper aside without reading it and demanded to know where Gulino had been for the past five weeks (A. 20; 348, 713, 716). Gulino shrugged off the question and warned Curry that if she refused to sign the paper, she would no longer be the shop steward, her union dues would be refunded, and she would be fired (A. 20; 349). Curry refused to sign the paper (A. 20; 348).

Later that day, Gulino instructed Hagler to refund all unauthorized dues deductions. Without any explanation to the employees, other than that union dues were being refunded, Hagler refunded the dues previously deducted (A. 21-22; 290, 415-416, 434-435, 504, 541-542, 552).

E. The Company threatens to discharge and discharges employees Abernathy, Cleary Curry, Gruenke and Sullivan on demand of the Union because of their refusal to sign checkoff authorizations or pay dues and initiation fees which were not uniformaly required of other employees

On Friday, February 28, Union Vice-President Henry Fineguerra, went to the Home to speak to the employees about payment of dues A. 23; 727). He stopped at the reception desk and asked the switchboard operator to page employees Cleary, Curry and La Paz (A. 22-23, n. 22; 353-355, 727-728, 731). When the employees arrived, Fineguerra told them that they owed initiation fees and dues in the amounts of $71, $65 and $71, respectively, that he wanted them to sign a paper authorizing dues' checkoff, and that they would be discharged unless they signed the paper and paid those amounts (A. 22-23; 353-355, 727-728). Cleary and Curry said that they had been paying dues right along, and La Paz said that she did not have the money (A. 23; 357-358). Fineguerra then proceeded to Hagler's office and demanded that Mrs. Hagler discharge the employees because they had not paid their dues and had not signed checkoff authorization cards (A. 23 n. 23; 669-670, 730, 736).[5/] Mrs. Hagler said that she could not honor his request without something in writing from the Union (A. 23, n. 23; 731-732, 735-736).

5/ These references includes Hagler's admission at A. 669-670 that the Union asked the Company to discharge the employees because they had not "signed authorization cards," but do not refer to that portion of Hagler's testimony at A. 670 — his answer to a question by counsel for the General Counsel — that was striken from the record by the Administrative Law Judge upon objection by counsel for the Union.

Finneguerra returned to the Home on Monday, March 3, approached employees Abernathy, Gruenke and Sullivan, and informed them that they owed the Union $71 (A. 22; 294-296, 507, 731-732). Abernathy asked what the money was for, and Finneguerra replied, "[U]nion dues and initiation fees" (A. 22; 369-376, 397-398). When Abernathy asked whether he was carrying any identification to prove that he was from the Union, Finneguerra stated that he had none (A. 22; 296). Abernathy asked what she would get for the $71, and Finneguerra replied that she would get "job security" (A. 22; 296, 298). Abernathy then asked what he would get for her money. Finneguerra did not answer (A. 22; 296-297). Finneguerra proceeded to Hagler's office and presented him with a typewritten demand for the discharge of employees Abernathy, Cleary, Curry, Gruenke, Sullivan and La Paz because "they have refused and failed to pay initiation fees and dues" (A. 22, 24 & n. 25; 165, 731).

About 1:30 p.m. the same day, the Company's cook supervisor asked Cleary whether he would "sign for [the Union] if it cost [him his] job" (A. 23; 418(c)). Cleary said that he would decide when the time came, and the cook responded, "[T]he time [is] here" because Cleary "was going to be called into Mr. Hagler's office" (A. 24; 418(c)). At about 3 p.m., Cleary was summoned to Hagler's office, where Finneguerra again advised him, in Hagler's presence, that he owed dues and initiation fees (A. 24; 418(d)-418(e)). Cleary insisted that he had paid his dues but Fineguerra stated that he had not received them (A. 24;

418(d)). He told Cleary to sign a paper he had with him and pay his dues (A. 24; 418(d)). Cleary turned to Hagler, who stated that if Cleary signed the paper, he would not be fired (A. 24; 418(f)-418(g), 443-444)).

Cleary left the office to find shop steward Curry (A. 24; 359, 418(f)). Cleary and Curry returned to Hagler's office and found employees Abernathy, Gruenke and La Paz there (A. 24; 299, 359-360, 418(f)). Hagler showed the employees the Union's discharge letter and said that he was sorry that he had to release them because they were good workers, but the Union had requested their immediate dismissal on the ground that they had not paid their union dues (A. 24; 300-301, 360, 391, 418(d), 511, 530, 699-700).

On March 5, Wanda Sullivan, who was not present on February 28 or March 3, was called to the reception desk where Fineguerra was waiting (A. 25; 532, 543). He told her "you owe me $71, and sign these papers" (A. 25; 543). Sullivan said that she did not have $71, that she did not owe him any money, and that she was not going to sign any paper (A. 25; 544, 553-554). Fineguerra then turned to Hagler, who was walking towards them, and said, "I want you to remove this woman from the job right now" (A. 25; 544-545). Hagler immediately told Sullivan that she was discharged (A. 25; 545).

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating employee Donald O'Toole about the employees' activities on behalf of Local 1115, by giving O'Toole the impression that the employees' activities were under surveillance, by threatening O'Toole with reprisals, and by warning employee William Cleary that if he liked his job, he would know how to vote in the deauthorization election (A. 30). The Board further found that the Company violated Section 8(a)(3), (4), and (1) of the Act by discharging and refusing to reinstate O'Toole because of his rival union activities and his participation in filing the deauthorization petition (A. 31). Additionally, the Board found that the Company violated Section 8(a)(2) and (1) of the Act by withdrawing and withholding union dues without appropriate signed authorizations, by soliciting employees to sign dual purpose membership/checkoff cards on behalf of the Union and by threatening employees with discharge for refusing to sign checkoff authorization or pay dues and initiation fees which were not uniformly required of other employees (A. 30). Finally, the Board found that the Company violated Section 8(a)(3)

and (1) of the Act by discharging employees Abernathy, Cleary, Curry, Gruenke and Sullivan, at the request of the Union, because of such refusal (A. 31-32).[6]

6/ The Board dismissed an allegation that the five employees' rival union activities contributed to their discharge (A. 30). The Board also dismissed allegations that the Company violated Section 8(a)(1) of the Act by: (1) interrogating employee Curry about her feelings for the Union, how she was going to vote in the deauthorization election, and whether she did not think the Union was the right choice (A. 14-15, 49); (2) asking employee Wanda Sullivan if she had voted in the election (A. 15; 49); (3) telling two employees that if they did not vote in the election, the Company could make it difficult for them (ibid.); (4) giving employees Cleary, Curry, and Gruenke the impression of surviellance of their union activities (A. 17-18, 4-9); and (5) threatening employee Curry with discharge if she continued to support Local 1115 (A. 18, 49). Finally, the Board dismissed an allegation that the Company's Section 8(a)(1) conduct considered together constituted unlawful assistance to the Union in violation of Section 8(a)(2) of the Act (A. 25-26, 49).

The Board also found that the Union violated Section 8(b)(1)(A) of the Act by using a dual purpose membership/checkoff authorization card without providing employees with an alternative to checkoff, by threatening employees with discharge if they did not sign the dual purpose cards or otherwise authorize check-off of dues, and by demanding a lump sum payment of dues and initiation fees which were not required of other employees (A. 31). The Board further found that the Union violated Section 8(b)(2) and (1)(A) of the Act by attempting to cause, and causing, the Company to discharge the above-named employees for these reasons and without first having fulfilled its fiduciary duty to advise them of their obligations under the union security agreement (A. 30). As previously stated, supra, p. 3 n. 2, the Court granted the Board's motion for default judgment against the Union. Thus, these findings are not before the Court.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing employees in the exercise of their Section 7 rights (A. 33). Affirmatively, the Board's order requires the Company to make employee Donald O'Toole whole for any loss of pay suffered by reason of the discrimination against him from the date of his discharge, September 16, 1974, until December 22, 1974, when O'Toole declined re-employment with the Company (A. 32).
The order also requires the Company to offer employees Abernathy, Cleary, Curry, Gruenke and Sullivan immediate and full reinstatement to their former or substantially equivalent position, without loss of seniority or other rights and privileges, to jointly and severally with the Union make them whole for any loss of pay suffered by reason of the discrimination against them, and to post the appropriate notices (A. 34-35).

ARGUMENT

I. The Applicable Legal Principles

Section 7 of the National Labor Relations Act guarantees employees the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other activites for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities. Section 8(a)(1) implements that guarantee by prohibiting employers from interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

Section 8(a)(2), (3) and (4) spell out specific employer violations, such as dominating, interfering with, or supporting any labor organization; discriminating in regard to hire, tenure, or conditions of employment in order to encourage or discourage membership in any labor organization; or retaliating against employees for filing charges or giving testimony before the Board. Analogous encroachments by unions are forbidden by Sections 8(b)(1) and (2). The purpose of this statutory scheme, is "to allow employees to freely exercise their right to join unions, be good, bad or indifferent members or abstain from joining any union" without being subject to intimidation or job discrimination by employers and unions. Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 40 (1954). Further, the fact that the Company had recognized another union does not "insulate [otherwise illegal employer] acts from the prohibitions" of the Act. N.L.R.B. v. Kiekhaefer Corporation, 292 F.2d 130, 135 (C.A. 7, 1961); accord: N.L.R.B. v. Sellers, 346 F.2d 625 (C.A. 9,1965).

The sole exception to the Act's all-inclusive ban against discrimination is contained in the proviso to Section 8(a)(3) which permits the discharge of employees for non-membership in a labor organization where an employer and the union representing its employees have entered into an agreement requiring union membership as a condition of employment. However, such discharge will not be lawful, under a second proviso to Section 8(a)(3), if the employer "has reasonable grounds for believing that membership was not available to the employees on the same terms and conditions generally applicable to other members" or "that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." This "exception has been carefully circumscribed by the express terms of the statute in order to protect the rights of the employee." N.L.R.B. v. Hotel, Motel and Club Employees Union, Local 568, 320 F. 2d 254, 258 (C.A. 3, 1963). As the Supreme Court has stated, "It is possible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." N.L.R.B. v. General Motors Corp., 373 U.S. 734 U.S. 734, 742 (1963). [Emphasis added.] "No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." Radio Officers' Union v. N.L.R.B., supra, 347 U.S. at 40-42.

Consistent with these principles, the Board has long held that even under a valid union security agreement, a requirement that employees sign checkoff authorizations is an additional and supplemental discrimination beyond the permissible limits of Section 8(a)(3). Hope Industries, Inc., 198 NLRB 853, 856-857 (1972), enf'd. without opinion, 481 F. 2d 1399 (C.A. 3, 1973); American Screw Company, 122 NLRB 485 (1958). Thus, employees have the right under Section 7 to determine, within reasonable limits, the method by which they will pay their dues. Ibid. "Any conduct, express or implied, which coerces an employee in his attempt to exercise this right clearly violates" the Act. Communications Employees of America, Local 6306, 198 NLRB 1098, 1101 (1972), quoting from International Union of Electrical, Radio and Machine Workers, Local 601, 180 NLRB 1062, 1062 (1970).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR RIVAL UNION ACTIVITIES, GIVING THE IMPRESSION OF SURVEILLANCE AND THREATENING REPRISALS IF THEY CONTINUED THOSE ACTIVITIES OR VOTED AGAINST THE INCUMBENT UNION IN THE DEAUTHORIZATION ELECTION

In the instant case, the Board found that the Company engaged in numerous unfair labor practices in opposition to the rival union and in support of the incumbent, which evidenced an utter disregard for the employees' Section 7 rights. That finding is amply supported by the record and the applicable case law. As shown supra, pp. 5-6, the Company's unlawful conduct commenced immediately after Administrator Hagler received reports that the employees had met with a representative of Local 1115 and had signed authorization cards on its behalf. Calling Shop Steward Donald O'Toole to his office, Hagler showed O'Toole a list of the employ[illegible]o had attended the meeting and demanded to know why the employees were dissatisfied with the incumbent Union, why they were signing authorization cards for Local 1115 and what had happened at the meeting. When O'Toole explained that he had gone over to Local 1115 for the benefit of the employees, Hagler accused O'Toole of "turning against him" and "causing nothing but problems" (A. 68-69). He also said that "he had given five dollars to someone who was at the meeting, and that they had given him the names of everybody who was at the meeting and that's how he found out who was there" (A. 68-69).

Sometime later, when Hagler found a group of employees in the kitchen discussing Local 1115, he singled O'Toole out, although he was the only employee not on working time, and told him that he would be better off if he concentrated more on his work than on holding up operations. On another occasion, Hagler warned O'Toole that he knew a lot of people and could see to it that O'Toole was fired because of his activities on behalf of Local 1115. On October 11, two hours before the deauthorization election, Hagler told employee Cleary that if he liked his job he would know how to vote.

Without question such conduct violates Section 8(a)(1) of the Act. See, Retired Persons Pharmacy v. N.L.R.B., 519 F. 2d 486, 492-493 (C.A. 2, 1975) (coercive interrogation) N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F. 2d 292, 297 C.A. 2, 1972) (impression of surveillance) N.L.R.B. v. Scoler's Incorporated, 466 F. 2d 1289, 1292 (C.A. 2, 1972) (threats of reprisal).

Before the Board, the main thrust of the Company's contentions was that the Administrative Law Judge erred in crediting O'Toole's testimony as to these events and in discrediting Administrator Hagler's denials that he engaged in any unlawful conduct. However, it is settled law that "questions of credibility are for the trier of fact." N.L.R.B. v. Columbia University, 541 F. 2d 822, 928 (C.A. 2, 1976); Therefore, this Court will not upset the Board when it accepts the findings of an Administrative Law Judge which are "grounded upon (a) his disbelief in an orally testifying witness' testimony because of the witness' demeanor or (b) the [Judge's] evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible . . . or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony. . . ." Accord: N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (C.A. 2, 1952). N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1965).

In the instant case, since the record does not demonstrate that the Administrative Law Judge's evaluations of the testimony, accepted by the Board, were "irrational or 'hopelessly incredible'". (N.L.R.B. v. Columbia University, supra), there is no reason for the Court to refuse to accept the Board's credibility determinations.

III. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3), (4), AND (1) BY DISCHARGING AND REFUSING TO REINSTATE EMPLOYEE DONALD O'TOOLE BECAUSE OF HIS RIVAL UNION ACTIVITIES AND HIS PARTICIPATION IN FILING A DE-AUTHORIZATION PETITION WITH THE BOARD

The Company's next acts of discrimination, Hagler's September 15 discharge of O'Toole and refusal to reinstate him, followed precipitously upon the September 10 filing of the union deauthorization petition sponsored by O'Toole and two other employees. Notice that the petition had been filed was admittedly received by the Company on Thursday, September 12, and that petition on its face showed that O'Toole was one of the sponsors. Three days later, on Sunday, September 15, at about 1:05 a. m., Hagler confronted O'Toole as he was taking some food from the refrigerator and began shouting that O'Toole had left the switchboard unmanned, that he had not brought in the lawn chairs, and that he was fired. He led O'Toole to his office, showed him some documents relating to the deauthorization petition and stated that O'Toole's activities in support of Local 1115 were not doing O'Toole any good and were costing Hagler "a bundle in legal fees" (A. 188). He then asked O'Toole to write out a statement admitting that he had been negligent in the performance of his work, as claimed. O'Toole refused, and Hagler said that he would consult with his attorney to determine whether it would be in his best interest to reinstate O'Toole. The following Thursday, Hagler told O'Toole that he had been unable to reach his

attorney and had decided to let the discharge stand. He added that "nothing personal" was involved but that O'Toole's involvement with Local 1115 rendered him of no further use to the Company.

These facts, found by the Administrative Law Judge and the Board, provide a substantial basis for the Board's finding that the Company discharged and refused to reinstate O'Toole because of his rival union activities and his co-sponsorship of the deauthorization petition, in violation of Sections 8(a)(3), (4) and (1) of the Act. Indeed, O'Toole's credited testimony of what Hagler told him at the time of his discharge and the following Thursday makes this case "one of those rare cases in which there has been 'an outright confession of unlawful discrimination'". N.L.R.B. v. John Langenbacher Co., 398 F.2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049, quoting from N.L.R.B. v. Ferguson, 257 F.2d 88, 92 (C.A. 5, 1958). O'Toole's credited testimony also "eliminate[es] 'any question concerning the intrinsic merits as to . . . the discharge . . ., the precise evidence showing management's knowledge that [he was] engaged in union activity or other causes suggested for the discharge'". N.L.R.B. v. Globe Products Corporation, 322 F.2d 694, 696 (C.A. 4, 1963), quoting from N.L.R.B. v. Ferguson, supra.

Moreover, the abruptness of the discharge, its timing, and the lack of prior warning are also persuasive evidence as to unlawful motivation. N.L.R.B. v. Advanced Business Forms Corporation, 474 F. 2d 457, 465 (C.A. 2, 1973); N.L.R.B. v. D'Armigene, Inc., 353 F. 2d 406, 409-410

(C.A. 2, 1965). Cf. N.L.R.B. v. Scrivener, 405 U.S. 117, 121-122 (1972). Further, the presence of a valid reason for the discharge, even assuming that there may have been one, is no defense where, as here, the discharge was based in significant part on antiunion animus. N.L.R.B. v. Advanced Business Forms Corporation, supra, 474 F. 2d at 463; N.L.R.B. v. George J. Roberts & Sons, 451 F. 2d 941, 945 (C.A. 2, 1971).

In any event, the Company's asserted reasons for the discharge -- O'Toole's alleged frequent derelictions of duty -- fail to withstand scrutiny and were reasonably rejected by the Board. For example, the Company initially contended that O'Toole's discharge was justified because he left the switchboard unattended in the middle of his shift to go to the kitchen for food. In support of its contention, it presented testimony from Hagler, who stated that O'Toole "understood" that he was supposed to report for duty a half hour before the swing shift switchboard operator went off duty, that he had the option of going to the kitchen during that half hour to prepare some food to take back to the switchboard with him, and that he was not permitted to leave the switchboard unattended at any time to eat (A. 8, n. 4, 9; 614). Upon cross-examination by the General Counsel's attorney, however, Hagler admitted that he had given O'Toole permission to eat whenever it was convenient and that his only instructions to O'Toole were that O'Toole was to eat at the switchboard and not leave it unmanned

(A. 8, n. 4, 9; 657, 659). Inconsistently, Hagler then asserted that it was contrary to his "instructions" for O'Toole to get food from the kitchen during the middle of his shift (A. 8, n. 4, 9; 665-666).

Clearly, such vascillating testimony by Hagler was insufficient to establish that O'Toole had violated any known rule or instructions by getting food from the kitchen on the night of his discharge. Moreover, it was undisputed that many of O'Toole's official duties required him to be away from the switchboard and that a microphone system enabled him to monitor the switchboard wherever he might be (A. 9; 138-139, 187). Accordingly, especially absent a contention that any inconvenience was occasioned by O'Toole's absence from the switchboard on that occasion, the Administrative Law Judge and the Board reasonably concluded that the Company merely seized on O'Toole's presence in the kitchen as a pretext to justify an otherwise discriminatory discharge.

No different conclusion is required because Hagler may have received complaints a month or two earlier that it took considerable time for two residents to reach O'Toole at the switchboard when they were ill (A. 9; 660-661, 664-665, 667, 685). As the Company conceded, O'Toole was required to make his rounds regardless of the circumstances (A. 9; 679). Thus, it was inevitable that there would be occasions when he could not get back to the switchboard in time to take a call. Yet, the Company presented no evidence that O'Toole was

remiss in failing to respond promptly on either of these occasions, that the Company found the residents' complaints significant when it received them, or that O'Toole was warned or reprimanded. Accordingly, the Board properly concluded that these prior incidents did not contribute to O'Toole's discharge.

Also unpersuasive was the contention that the discharge was precipitated by O'Toole's failure to bring in the lawn chairs earlier in the evening. Hagler, himself, stated that O'Toole had frequently neglected to carry out that assignment after protesting in July or August that the chairs would block a fire exit (A. 11, 12, n. 9; 625). Yet, he tolerated O'Toole's alleged disobedience and did not reprimand O'Toole for it until after the deauthorization petition was filed (A. 11, 12, n. 9, 201-202).

Equally without merit is the contention that the Administrative Law Judge and the Board erred in crediting O'Toole's testimony concerning the circumstances of his discharge because O'Toole testified that Hagler showed him copies of petitions signed by the employees' to support the deauthorization petition, while the General Counsel's attorney admitted that the Board does not furnish such documents to employees (A. 10; 110-111, 166-169). However, as the Administrative

Law Judge noted (A. 10), the mere fact that the Company did not receive the documents from the Board did not preclude the possibility that it received them from other sources. Moreover, O'Toole may simply have been confused as to the exact nature of the documents that Hagler showed him since he identified the documents shown to him at the hearing as the ones in question because his name was on them. Yet, the de-authorization petition admittedly received by the Company also bore his name. Thus, the discrepancy, if any, was hardly sufficient to impugn O'Toole's general credibility, and the trier of fact was not required to reject his testimony. N.L.R.B. v. Universal Camera Corp., 179 F. 2d 749, 754 (C.A. 2, 1950), remanded on other grounds, 340 U.S. 474 (1951); Champion Papers, Inc. (Ohio Division) v. N.L.R.B., 393 F. 2d 388, 394 (C.A. 6, 1968); Pioneer Drilling Co., Inc. v. N.L.R.B., 391 F. 2d 961, 964, n. 3 (C.A. 10, 1968).

Finally, there is no merit to the contention that the Board should have deferred to an arbitration decision issued on October 31, 1974, which found that O'Toole was discharged for just cause. The Board has, of course, long given acceptance to the arbitral process and has voluntarily withheld its authority to adjudicate alleged unfair labor practices involving the same subject matter as an arbitrated grievance "where it can do so without abandoning its obligation to protect rights which the Act guarantees to employers, bargaining representatives, individual employees or the public," Monsanto Chemical Co., 130 NLRB 1097, 1098-1099 (1961). Thus, in cases in which certain minimum standards

have been met - that is, all parties have agreed to be bound by the decision of the arbitrator, the proceedings are fair and regular, and the award is not repugnant to the policies and the purposes of the Act - the Board has, indeed, deferred to decisions of arbitrators and bi-partite greivance panels covering the same subject matter as the arbitrated grievance. Spielberg Manufacturing Co., 112 NLRB 1080. International Harvester Co., 138 NLRB 923, 926, enf'd. sub. nom, Ramsey v. N.L.R.B., 327 F. 2d 734 (C.A. 7, 1964). See also, Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-271 (1963); Steves Sash & Door, Inc. v. N.L.R.B., 430 F. 2d 1364, 1365 (C.A. 5, 1970), enforcing, per curiam, 178 NLRB 154, and cases cited therein. And, even where arbitration has not yet resulted in an award, the Board has more recently left the decision to the arbitral process where there was reasonable cause to believe that use of that machinery by the parties would resolve the issue in a manner compatible with the purposes and policies of the Act. Collyer Insulated Wire, 192 NLRB 837 (1971). Accord: Lodge 1327, Int'l. Ass'n. of Machinists v. Fraser & Johnston Company, 454 F.2d 88, 91 (C.A. 9, 1971). However, as the Board stated in Joseph T. Ryerson & Sons, Inc., 199 NLRB 461 (1972), 81 LRRM 1261, 1263, "it has never been the practice of the Board, and it is not now, to abstain from action in cases which are unresolvable in conformity with Spielberg, in an alternate forum." Accord: N.L.R.B. v. International Longshoremen's & Warehousemen's Union & Local 27, 514 F. 2d 481, 483 (C.A. 9, 1975)

(refusal to defer upheld where there was an apparent conflict of interest between the employee and the union representing him); T.I.M.E. - D.C., Inc. v. N.L.R.B., 504 F. 2d 294, 302-303 (C.A. 5, 1974) (refusal to defer upheld where both the employer and the union were hostile to the employee's interests); Kansas Meat Packers, 198 NLRB 543, 544 (1974) (refusal to defer because "it would be repugnant to the purposes of the Act to . . . relegate the Charging Parties to an arbitral process, authored, administered, and invoked entirely by parties hostile to [the employees'] interests"). Cf. N.L.R.B. v. Horn & Hardart Co., 439 F. 2d 674, 678-681 (C.A. 2, 1971).

The instant case falls squarely within this rule. O'Toole's rival union activities were in substantial conflict with the interests of the incumbent Union and there were reasonable grounds for assuming that his interests were not adequately protected before the arbitrator. The Board therefore reasonably concluded that it would not serve the purposes of the Act to defer to arbitration in this case (A. 12, 49, n. 1).

IV. SUBSTANTIAL EVIDENCE ON THE RECORD RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(2) AND (1) OF THE ACT BY WITHHOLDING UNION DUES FROM THE WAGES OF EMPLOYEES WHO HAD NOT SIGNED CHECKOFF AUTORIZATIONS, SOLICITING EMPLOYEES TO SIGN DUAL PURPOSE MEMBERSHIP/CHECK-OFF CARDS AND THREATENING EMPLOYEES WITH DISCHARGE FOR REFUSING TO SIGN CHECKOFF AUTHORIZATIONS AND PAY DUES AND INITIATION FEES WHICH WERE NOT UNIFORMLY REQUIRED OF OTHER EMPLOYEES

The Company overstepped the permissible limits of the Act not only by interfering with its employees' rival union activities but also by attempting to regulate their relations with the incumbent Union. As shown supra, pp. 8-11, sometime after entering into the union security agreement, the Company commenced deducting dues from the pay of employees hired in late spring and early summer of 1974. Subsequently, in October and November, the Company withheld dues from the wages of employees Abernathy, Cleary, Curry, Gruenke and Sullivan, who were hired later and had not been asked to, and did not, join the Union or sign checkoff authorizations. Those employees protested that the payroll deductions were improper, but the bookkeeper advised them that dues were being checked off for all employees pursuant to instructions from Administrator Hagler. Hagler, responding to questions from employee Gruenke, merely stated that the deductions were for Union dues. Later, Union Representative Gulino told the employees to "forget that particular matter" (A. 275).

Months later, Gulino checked with the bookkeeper, identified the problem, and told her that it was unlawful to check off dues without

obtaining signed authorizations. Without any explanation to the employees as to their rights in the matter, the bookkeeper asked them to sign membership/checkoff authorizations, and, when her solicitations were unsuccessful, Hagler returned the money, stating only that he was refunding Union dues. Thereafter, the Union demanded that the employees sign a paper authorizing dues deductions and make a lump sum payment of back dues, plus initiation fees, which had not been required of employees who had authorized dues' deductions. In turn, the Company, through its cook supervisor and Administrator Hagler, told employee Cleary that he would not be discharged if he "joined up with the Union", signed the paper the Union representative presented, and paid his back dues (A. 418(c)).

As the Board found, this course of conduct was destructive of fundamental employee rights because it conveyed the message that the only way employees could satisfy their dues-paying obligation was by authorizing checkoff of dues. Since union membership may only be conditioned upon the payment of uniformly required dues and fees (N.L.R.B. v. General Motors, supra), the Board therefore properly found that the unauthorized deductions of dues, the solicitations to sign membership/checkoff authorizations and the threats of discharge were unwarranted acts of assistance to the Union, in violation of Section 8(a)(2) and (1) of the Act. See, e.g., Chun King Sales, Inc., 126 NLRB 851, 867 (1967) (unauthorized checkoff of dues found violative of the act). International Union of United Brewery Flour, Cereal, Soft Drink and Distilling Workers, 195 NLRB 772, 779 (1972) (threats to compel checkoff

authorizations found violative of the act); International Union of District 50, 173 NLRB 87 (1968) (use of dual-purpose membership checkoff cards found violative of the act). Cf. N.L.R.B. v. Penn Cork & Closures, Inc., 376 F.2d 52 (1967), cert. denied, 389 U.S. 843.

V. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ACQUIESCING IN THE UNION'S CONCEDEDLY UNLAWFUL REQUEST THAT IT DISCHARGE EMPLOYEES ABERNATHY, CLEARY, CURRY GRUENKE AND SULLIVAN FOR REASONS OTHER THAN THEIR FAILURE TO PAY UNIFORMLY REQUIRED DUES AND INITIATION FEES

The sole question presented with respect to the subsequent discharge of employees Abernathy, Cleary, Curry, Gruenke and Sullivan is whether the Company had reasonable grounds for believing that the Union's discharge demand was based on reasons other than their failure to tender uniformly required periodic dues and fees. The evidence shows that it did. After Hagler refunded the improperly deducted dues payments, Union Representative Gulino demanded that the employees sign checkoff authorizations and make a lump sum payment of back dues and initiation fees. When the employees rebuffed him, he asked the Company to discharge them on both these grounds, although when he put the request in writing he stated only that the employees had failed and refused to pay their dues and initiation fees. In addition, the Company knew or should have known from its own records that initiation fees were not required of employees who had signed checkoff authorizations, so it knew that initiation fees were being collected only from employees who had not signed authorization cards. Moreover, Adminis-

trator Hagler was present when Fineguerra demanded Cleary's signature on a document authorizing dues deductions, and Hagler himself told Cleary that he would not be discharged if he signed the paper and paid his dues. These circumstances were more than adequate to demonstrate that the Company had knowledge that the Union's request for discharge was predicated on the employees' refusal to sign checkoff authorizations rather than solely on their failure to pay uniformly required dues and fees. Since the Company had reasonable grounds for recognizing that the Union's request was not based upon the only ground permitted by the statute, the Board properly concluded that the Company's decision to discharge the employees was a violation of Section 8(a)(3) and (1) of the Act.

N.L.R.B. v. Zoe Chemical Co., Inc., 406 F. 2d 574 (C.A. 2, 1969), relied on by the Company before the Board is clearly distinguishable on its facts. In that case, the incumbent union, confronted with a rival representation petition, demanded that the employees sign membership cards and commence dues payments in thirty days. Thereafter, it sought the discharge of twelve employees who failed to do so, stating affirmatively in a letter to the employer that the membership requirement of the collective bargaining agreement would be fully satisfied if dues and initiation fees were paid. Meeting resistance from the employer, it took the matter to an arbitrator who ruled that the employer was required to discharge those employees who failed "to join the union" before a certain subsequent date. Id. at 577. Then, when that time came and the employer again refused to discharge the employees, the union had the arbitrator's award judicially confirmed.

Meanwhile, after the arbitrator's award issued, the employees tendered dues but their tender was rejected because they refused to sign membership cards. They subsequently advised the employer that they had tendered dues to the union, that the tender had been rejected and that they had no legal obligation to join the union. The employer nevertheless discharged the twelve employees in accordance with the judicially confirmed arbitration award.

On those facts, noting particularly that the union's demand for signed membership cards was never specifically called to the employer's attention, this Court concluded that the employer "might very reasonably have believed that [the employees] still refused to meet such a valid union condition for membership as payment of dues." Id. at 582. It further found that, in view of the length and complexity of the litigation, further inquiry into why the union had rejected the employees' dues tender would have been "a formidable and quite possibly fruitless task". Id. at 584. Finally, it noted that the employer had maintained a position of complete neutrality in the inter-union struggle, had twice resisted the union's attempts to cause the discharge of the recalcitrant employees, and would have faced possible contempt proceedings if it again refused to comply with the union's request for discharge. For all of these reasons, the Court concluded that it would be inequitable to impose upon the employer either the duty to investigate or the liability for backpay. 8/

8/ In fact, this Court's 1969 decision in Zoe also relied on the proposition that it would not be fair to hold the employer liable because "the statute is ambiguous [and] the past case law [is] unclear" on the issue of whether a union may lawfully require employees to sign union membership cards on pain of discharge

continued

The instant case presents an entirely different situation. Here, the Company was a party to the unauthorized dues deductions and coercive efforts to obtain checkoff authorizations which the employees had no legal obligation to sign. It had actual knowledge that the union was adamant in its insistence that the employees sign checkoff authorizations and was retaliating against those who refused to do so by demanding that they pay initiation fees that employees who had authorized dues deductions were not required to pay. Notwithstanding, it supported the Union in its attempts to secure compliance and discharged the employees when they held fast to their rights.

8/ where the union and company have entered into a lawful union security agreement requiring membership as a condition of employment. 406 F.2d at 584. Subsequently, however, the Supreme Court stated in Motor Car Employees v. Lockridge, 403 U.S. 274, 284 (1971):

> [T]he evident thrust of this aspect of the federal statutory scheme [8(a)(3) and 8(b)(2)] is to permit the enforcement of union security clauses, by dismissal from employment, only for failure to pay dues. Whatever other sanctions may be employed to exact compliance with those internal union rules unrelated to dues payment, the Act seems generally to exclude dismissal from employment. See Radio Officers Union v. N.L.R.B., 347 U.S. 17 (1954). [Emphasis added.]

See also, Local Union No. 749, International Brotherhood of Boilermakers, etc. v. N.L.R.B., 466 F.2d 343 (C.A.D.C., 1972), cert. denied, 410 U.S. 926; N.L.R.B. v. Hershey Foods Corporation, 513 F.2d 1083 (C.A. 9, 1975).

Having thus lent unlawful assistance to the erring union, with all the facts before it, the Company cannot reasonably contend that the same considerations prevail here as in _Zoe Chemical_. Rather, this case represents "the prototype situation to which Section 8(a)(3). . . was presumably directed: prompt and unquestioning acquiescence by the employer in discharging an employee towards whom the union is hostile or abritrary" and for reasons other than their failure to tender the unformly required dues and initiation fees. _N.L.R.B._ v. _Zoe Chemical Co._, _supra_, 406 F. 2d at 582.

CONCLUSION

For the reasons stated above, we respectfully submit that a judgment should issue enforcing the Board's order in full.

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February 1977

SUPPLEMENTAL APPENDIX

AGREEMENT, made and entered into this 1st day of MAY, 1974 between MEDICAL AND HEALTH EMPLOYEES UNION, LOCAL #4, hereinafter referred to as "UNION", and GLORIA'S MANOR 140 BEACH 119 ST. BELLE HARBOR N.Y. hereinafter referred to as "EMPLOYER", effective as of the 1st day of MAY, 1974.

RG
JH

W I T N E S S E T H :

WHEREAS, the Union has been recognized as the exclusive representative for the purposes of collective bargaining of all full time and regular part-time employees and professional and regular employees of the Employer; and

RG
JH

WHEREAS, the parties hereto have met and negotiated with respect to the terms and conditions of a collective bargaining agreement,

NOW, THEREFORE, the parties hereto hereby agree as follows:

ARTICLE I

RECOGNITION AND COVERAGE

The Employer recognizes the Union as the sole and exclusive collective bargaining agency for, and this agreement covers and applies to, all its full-time and regular part-time employees and working staff, including all office clerical employees, counselors, administrative employees, orderlies, and maintenance and cleaning employees, as defined in the National Labor Relations Act.

RG
JH

ARTICLE II

UNION SECURITY AND TRIAL PERIOD

Section 1. It shall be a condition of continued employment for all present employees of the Employer covered by this agreement, who are members of the Union in good standing on the execution date of this agreement to remain members of good standing. All other present and future employees of the Employer within the unit covered by this agreement shall, as a condition of continued employment by the Employer, become and remain members in good standing in the Union on the 30th calendar day following their employment or the execution date hereof, whichever is later.

Section 2. The Employer shall notify the Union of employment of new employees within the bargaining unit within thirty (30) days after the start of said employment. However, during the employee's sixty (60) day probationery period, his employment may be terminated at the sole discretion of the Employer, with or without cause, and not subject to the grievance and arbitration procedures in this contract. However, during the probationery period the employee shall be entitled to all the other benefits provided herein for all employees.

Section 3. The Union agrees to accept and take into membership employees of the Employer, on the same terms and conditions as all other members in the Union and without discrimination.

Section 4. The Employer agrees that beginning with the month of MAY , 1974 it will deduct from the salary of any present or future employee covered by this agreement from whom a duly executed checkoff authorization has been submitted, the uniform current dues and initiation fee which the employee is required to pay the Union for the month. Such deduction shall be withheld

S.A. 2

from the first pay of each month of the authorizing employee and shall be remitted to the Employer to the Union within ten (10) days after such deduction. Where deductions are made after the first payroll period of the month, they shall be forwarded with the following month's remittance. The Union will advise the Employer, in writing, of the amount of the uniform dues and initiation fee. The voluntary checkoff authorization submitted to the Employer by any covered employee shall comply with the requirements of law and shall be irrevocable for one (1) year or until the expiration date of the current agreement between the parties, whichever occurs sooner.

ARTICLE III

WAGES AND HOURS

Section 1. Each employee covered under this contract shall receive a five (5%) percent annual pay increase, commencing ~~January~~ MAY 1, ~~1973~~ 1974 based upon the highest weekly base pay received by the employee during the 1972 calendar year, excluding overtime and bonuses. A similar increase shall be granted each succeeding year to wit: ~~January~~ MAY 1, ~~1974~~ 1975 and ~~January~~ MAY 1, ~~1975~~ 1976.

RG
JH

Section 2. The regular work week shall consist of forty (40) hours.

Section 3. Overtime shall be computed at the rate of time and one-half for hours worked in excess of forty (40) hours in a normal work week.

ARTICLE IV

HOLIDAYS AND VACATIONS

Section 1. When any of the following holidays falls on a regular company working day, the Company will pay employees eight (8) hours pay for such holidays without work being performed on such days: New Year's Day, Memorial Day, Labor Day, Thanksgiving Day, Christmas Day, July Fourth, ~~Lincoln's Birthday and Washington's Birthday~~. HOLIDAYS MAY BE SUBSTITUTED FOR JEWISH HOLY DAYS AT THE DISCRETION OF THE EMPLOYER.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. JO JO MANAGEMENT CORP. d/b/a GLORIA'S MANOR HOME FOR ADULTS, Respondent.	)	No. 76-4234

CERTIFICATE OF SERVICE

The undersigned certifies that one (1) copies of the Board's appendix in the above-captioned case has this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 25th day of February, 1977.